The Evolving Use of Presumptions in the Criminal Law: *Sandstrom v. Montana*

I. INTRODUCTION

Sandstrom v. Montana[1] refined the constitutional limitations on presumptions[2] used in criminal cases and raised to constitutional significance the principle that a trial court cannot prejudge the issue of intent when intent is an element of the crime charged. In *Sandstrom*, the Supreme Court also clarified the due process restrictions that have developed in regard to presumptions. This Comment will first examine the premise behind the use of presumptions and the continuing validity of this evidentiary device. The decisions that have shaped the guidelines for presumptions, and the relationship of these cases to *Sandstrom* will then be examined. Finally, this Comment will consider *Sandstrom*'s impact on the present state of the law and possible future ramifications.

David Sandstrom was charged with "deliberate homicide" under a Montana statute[3] that required the defendant to possess purpose or knowledge in the commission of the crime. Sandstrom confessed to the killing but maintained that he lacked the requisite state of mind because of a "mental disease" that precluded criminal responsibility.[4]

At the trial level, the prosecution requested an instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." The defendant argued that the instruction forced him to bear the burden of proof on the element of intent and thereby violated his right to due process. The instruction was delivered over this objection and the jury returned a guilty verdict.

---

1. 442 U.S. 510 (1979).

2. 9 J WIGMORE, A TREATISE OF THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 2498a (3d ed. 1940 & Supp. 1980) [hereinafter cited as WIGMORE], states that:

> [P]resumption means that where one or more specific facts are proved, as evidence tending to prove a fact-in-issue, and no evidence negativing the fact-in-issue has been introduced, the fact-in-issue is by rule of law established as proved, without further evidence in the affirmative.

Professor Morgan states that a "true" presumption is one that creates an inference that is mandatory unless evidence is produced to the contrary. E. MORGAN, BASIC PROBLEMS OF EVIDENCE 31-37 (1963). The word has, however, taken on a number of different meanings. *See* notes 51-53 *infra*.

3. MONT REV. CODE ANN (Supp. 1973): The Statute provides:

> 94-5-101. Criminal homicide. (1) A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.
> (2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide.
> 94-5-102. Deliberate homicide. (1) Except as provided in 94-5-103(1)(a), criminal homicide constitutes deliberate homicide if:
> (a) it is committed purposely or knowingly. . . .

4. 442 U.S. 510, 512 (1979). The petitioner argued that "a personality disorder aggravated by alcohol consumption" constituted the "mental disease."

Sandstrom's conviction was affirmed on appeal to the Montana Supreme Court.[5] Commenting on the jury instruction,[6] the court noted that such a presumption had been "a part of Montana law since 1895"[7] and had been reviewed and approved in a recent state decision.[8] The court rejected the due process objection by stating that although the prosecution must bear the burden of proof on each element of the crime, the presumption in question merely imposed a burden of production on the defendant. The presumption only allocated "*some* burden of proof"[9] to the defendant by requiring him to produce some evidence of lack of intent.

The United States Supreme Court viewed the presumption differently,[10] and reversed and remanded Sandstrom's conviction.[11] The Court stated that the jury, acting reasonably, could have interpreted the instruction in an unconstitutional manner since no guidance was offered on the presumption's effect. The jury may have perceived the presumption as conclusive or as shifting the burden of persuasion on the element of intent.[12] Either interpretation would have violated Sandstrom's right to due process under the fourteenth amendment.

II. RATIONALE AND VALIDITY OF PRESUMPTIONS

While presumptions are generally used to achieve a variety of results,[13] presumptions in criminal cases typically arise in response to the prosecution's difficulty in proving an element of the crime, most often the mental element. For instance, in *Sandstrom*, defendant's intent or lack thereof can be known for certain only by the defendant. The prosecution must rely on circumstantial evidence to prove this element beyond a reasonable doubt. The presumption eases the prosecution's burden by allowing the mental element to be inferred from the act. Although the jury naturally might make the inference from the evidence, the presumption

5. State v. Sandstrom, 580 P.2d 106 (Mont. 1978), *rev'd*, 442 U.S. 510 (1979).

6. Another issue was Sandstrom's requested review of the trial court's decision to deny a change of venue due to allegedly prejudicial pretrial publicity.

7. State v. Sandstrom, 580 P.2d 106, 109 (Mont. 1978), *rev'd* 442 U.S. 510 (1979), *quoting* State v. McKenzie, 581 P.2d 1205, 1222 (Mont. 1978).

8. State v. Coleman, 579 P.2d 732 (Mont. 1978).

9. State v. Sandstrom, 580 P.2d 106, 109 (Mont. 1978) (emphasis in original).

10. As *Sandstrom* noted, 442 U.S. 510, 514 n.3 (1979), a number of courts had already disapproved of this instruction. *See* Chappell v. United States, 270 F.2d 274 (9th Cir. 1959); Bloch v. United States, 221 F.2d 786 (9th Cir. 1955); Berkovitz v. United States, 213 F.2d 468 (5th Cir. 1954); Wardlaw v. United States, 203 F.2d 884 (5th Cir. 1953); Hall v. State, 272 So. 2d 590, 593 (Ala. Ct. Crim. App. 1973); State v. Warbritton, 211 Kan. 506, 506 P.2d 1152 (1973). *See also* United States v. Wharton, 139 U.S. App. 293, 433 F.2d 451 (D.C. Cir. 1970). In addition, two Circuit Courts of Appeals have ordered their district courts to delete the instruction in future cases. *See* United States v. Garrett, 574 F.2d 778 (3d Cir. 1978); United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977).

11. Justice Brennan delivered the opinion for the Court; Justices Rehnquist and Burger concurred.

12. The Montana Supreme Court had interpreted the "purposely or knowingly" language to embody the criminal intent element of the offense. Brief for Petitioner at 12, Sandstrom v. Montana, 442 U.S. 510 (1979).

13. *See, e.g.*, Watkins v. Prudential Ins. Co., 315 Pa. 497, 173 A. 644, 648 (1934).

assures the factfinder that a conviction can be secured even if there is no direct evidence on an element. Professor McCormick notes that a presumption helps to "correct an imbalance resulting from one party's superior access to the proof."[14] Case law likewise views presumptions as having this purpose,[15] and even the most recent decisions proclaim the vitality of presumptions when used in a proper manner.[16]

On the other side of the coin, the effectiveness of the presumption demands the safeguard of certain limitations. This Comment will address these restrictions.

III. BACKGROUND

The Supreme Court has dealt with two lines of cases concerning presumptions in the criminal law. The first set examines the prima facie constitutional validity of the presumption, that is, whether the content of the presumption meets the due process requirements of the fourteenth amendment. The second line of cases concerns the way in which the jury interprets the effect of the presumption. The former approach focuses on the actual words of the presumption while the latter examines the instructions and general presentation to the jury to determine how a reasonable juror may have applied the presumption. Both statutorily created and common-law presumptions must meet these two standards.

A. *Determining the Constitutionality of a Presumption*

1. *Rational Connection Test*

The rational connection test is still the standard used to evaluate the facial validity of a presumption, but the test has undergone some development. As first enunciated in 1910,[17] the test required only that there exist "some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."[18]

Although the test was rather toothless at this early stage, one of its first applications in a criminal case gave the rational connection test some bite. In *McFarland v. American Sugar Refining Company*[19] the Court was confronted with a Louisiana statute which presumed that anyone in the sugar refining business who paid less for the product in Louisiana than in other states was part of a monopoly. In striking down the statute, the Court warned that "the legislature may go a good way in raising [a

14. E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 343 (2d ed. 1972 & Supp. 1978) [hereinafter cited as MCCORMICK].

15. *See, e.g.*, Turner v. United States, 396 U.S. 398, 409 (1970).

16. County Court v. Allen, 442 U.S. 140, 157 (1979).

17. Mobile, Jackson & Kansas City R.R. v. Turnipseed, 219 U.S. 35 (1910). The case concerned a Mississippi statute that imposed a presumption of negligence on the part of the railroad once damages were proved. The presumption was deemed constitutional.

18. *Id.* at 43.

19. 241 U.S. 79 (1916).

presumption] or in changing the burden of proof, but there are limits. . . . [I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."[20]

Subsequent cases looked to a combination of sometimes elusive factors to judge the rational connection between the presumption and the fact proved. Such factors included a consideration of extrinsic matter to put the offense and the presumption in context.

In *Yee Hem v. United States*[21] the Court upheld under the rational connection test a statutory presumption that a possessor of opium knew that it had been illegally imported. In reaching its decision, the Court considered related issues such as when the importation was outlawed. It concluded that "[l]egitimate possession . . . [was] highly improbable."[22] Thus, knowledge of the illegality could be rationally presumed from the possession.

In like manner, the Court in another case[23] found a rational connection between the unexplained presence of a defendant at the site of an illegal still and the presumption that he was "carrying on" an unbonded distillery. The Court noted that the stills were usually well hidden and accessible only to those engaged in the business. The extrinsic fact of how typical stills were operated bolstered the rationality of the statute. A later case, however, failed to find the necessary link between presence at a still and *possession* of the business.[24] The connection was strained and presumed too much from a solitary fact.

The original formulation of the rational connection test offered the Court a rather free hand in its examination of presumptions. A better defined test was beginning to evolve.

2. *Redefining the Rational Connection Test*

The structure of the rational connection test was tailored somewhat by *Tot v. United States*.[25] The Court, in announcing that the rational connection test was the only relevant standard and that no alternative tests would be considered, expressly rejected the "comparative convenience" test[26] that allowed a presumption to burden a defendant whenever the

---

20. *Id.* at 86.

21. 268 U.S. 178 (1925).

22. *Id.* at 184.

23. United States v. Gainey, 380 U.S. 63 (1965).

24. United States v. Romano, 382 U.S. 136 (1965).

25. 319 U.S. 463 (1943). The case was brought under a provision of the Federal Firearms Act which stated that a person found in possession of a firearm who had previously been convicted of a violent crime was to be presumed to have received the weapon through interstate commerce in violation of the statute. The Court held that the connection between possession and interstate commerce was not a rational one, and thus the presumption violated due process.

26. *See* Morrison v. California, 291 U.S. 82 (1934); Rossi v. United States, 289 U.S. 89 (1933); Casey v. United States, 276 U.S. 413 (1928).

Tot also rejected the position that "Congress' greater *power* to enact a statute to prohibit the possession of all firearms by persons convicted of violent crimes, necessarily *included the lesser power* to create the presumption in question." MCCORMICK, *supra* note 14, at § 344.

accused possessed greater familiarity with the facts and which asked whether "on balance, it is easier for the defendant to disprove the presumed fact than for the prosecutor to prove it."[27] Although the Court's rejection of the comparative convenience test was not very significant since it had not been widely endorsed, the Court's reasoning put an interesting gloss on the rational connection test: "Nor can the fact that the defendant has the better means of information, standing alone, justify the creation of such a presumption."[28] The Court's disapproval of the better access to information rationale, which traditionally had been a basic premise behind the use of presumptions,[29] revealed the Court's aversion to devices that force an unfair onus upon the defendant.

The most noteworthy restatement of the rational connection test is found in *Leary v. United States*.[30]

> The upshot of *Tot*, *Gainey*, and *Romano* is . . . that a criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[31]

By requiring the link between the fact proved and the presumption to be "more likely than not" as opposed to merely "rational," the previous standard of constitutionality was strengthened. Nevertheless, the *Leary* test may yet be an inadequate means of protecting the defendant's due process rights.

3. *The Reasonable Doubt Test*

The *Leary* Court evaded the issue whether an even higher standard, the reasonable doubt test, should apply to presumptions that aid in establishing an element of the crime charged.[32] The question remains unanswered but its recurrence in subsequent cases manifests its salience.

Of major importance is the principle that a conviction must rest upon proof of guilt beyond a reasonable doubt. But if a case can be supported with a presumption that would not meet this standard, the defendant may have been denied due process. Furthermore, such a double standard might encourage the prosecution to rely on the presumption instead of attempting to offer evidence on the element.[33]

---

27. Bewley, *The Unconstitutionality of Statutory Presumptions*, 22 STAN. L. REV. 341, 345 n.32 (1970).

28. Tot v. United States, 319 U.S. 463, 469 (1943).

29. *See* notes 13-14 and accompanying text *supra*.

30. 395 U.S. 6 (1969), in which knowledge of the illegal importation of marijuana was presumed from its possession. Because of the large amount of marijuana grown within the country, the Court held invalid that part of the presumption that presumed knowledge from possession.

31. *Id.* at 36.

32. The Court stated that the statute did not meet the more-likely-than-not standard, so there was no need to consider whether a criminal presumption must adhere to the reasonable doubt test. 395 U.S. 6, 36 n.64 (1969).

33. Bewley, *The Unconstitutionality of Statutory Presumptions*, 22 STAN. L. REV. 341, 353 (1970).

In *Turner v. United States*[34] the Court again mentioned the possibility that the reasonable doubt test might apply to criminal presumptions. The case concerned a statutory presumption, similar to that in *Leary*, in which knowledge of the illegal importation of a narcotic could be presumed from possession. The Court concluded:

> [T]he overwhelming evidence is that the heroin consumed in the United States is illegally imported. . . . Whether judged by the more-likely-than-not standard . . . or by the more exacting reasonable-doubt standard normally applicable in criminal cases, [the statutory presumption] is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug.[35]

Reviewing a history of cases that had assumed the principle, *In Re Winship*[36] declared that, in a criminal case, proof beyond a reasonable doubt is a constitutional requirement. The Court confirmed a rule that had long ago developed strong roots in all American jurisdictions[37] by stating that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[38] This explicit statement raises questions about the constitutionality of a presumption that meets only the rational connection test, and thus permits a conviction despite the lack of sufficient proof on an element of the crime.[39]

The Court continued to "shuffle step" the reasonable doubt issue in *Barnes v. United States*.[40] After examining the cases it concluded "that if a statutory inference . . . satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process."[41]

Two cases decided the same term as *Sandstrom* moved toward and

---

34. 396 U.S. 398 (1970).

35. *Id.* at 415-16.

36. 397 U.S. 358 (1970).

37. Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979). The authors point out that a formal interpretation of *Winship* makes the case seem "scarcely revolutionary." As traditional doctrine advised, the prosecution must prove the elements of the crime to meet the reasonable doubt standard, and the accused bears the burden of proof on the issue of defenses. A procedural approach would, however, give a far more expansive interpretation to *Winship*. This formulation would require "the prosecution to prove beyond a reasonable doubt not only the presence of every element of the offense, but also the absence of justification, excuse, or other grounds of exculpation or mitigation." Since "crimes" and "defenses" are "substantially equivalent", such an approach is a plausible, although not an accepted one. *Id.* at 1328-1338.

38. In Re Winship, 397 U.S. 358, 364 (1970).

39. *See* Bewley, *The Unconstitutionality of Presumptions*, 22 STAN. L. REV. 341, 349 (1970). The author states that statutory presumptions under the *Leary* test deny due process because "(1) they permit verdicts based upon evidence insufficient to support a finding beyond a reasonable doubt, (2) they force the jury to make arbitrary decisions, and (3) they direct verdicts for the prosecution unconstitutionally."

40. 412 U.S. 837 (1973). The *Barnes* Court found a rational connection between the petitioner's possession of stolen Treasury checks and the presumption that the accused knew they were stolen.

41. *Id.* at 843.

then retreated from an assertion that criminal presumptions must meet the reasonable doubt standard. In *Jackson v. Virginia*[42] the Court announced that in reviewing a conviction being challenged for insufficiency of evidence, the previous standard,[43] which required only the existence of *some* evidence on every element of the crime, was no longer acceptable. Rather, the test is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[44] Thus, any element of the crime that had been proved through the use of a presumption was required to meet this strict standard.

The retreat came in *County Court of Ulster v. Allen*,[45] in which the defendants challenged a statutory presumption[46] on the ground that it should be judged according to the reasonable doubt standard. That is, the presumption is valid only if the facts necessary to raise the inference are sufficient for "a rational jury to find the inferred fact beyond a reasonable doubt."[47] The Court declared that "the prosecution may rely on all of the evidence in the record to meet the reasonable-doubt standard. . . . "As long as it is clear that the presumption is not the sole and sufficient basis for a finding of guilt, it need only satisfy the test described in *Leary*."[48] While *Jackson* intimated that a rational factfinder must be convinced beyond a reasonable doubt concerning *each* element, *Allen* stated that the test applies to the record when viewed in its entirety. Since challenges based on insufficiency of evidence are typically aimed at a single element of the crime (usually the mental state) it appears that *Jackson*, when read in conjunction with *Allen*, failed to strengthen the rational connection test to any great degree.

Sandstrom did not discuss the validity of the presumption in terms of the rational connection test since the challenge focused on the jury instruction. Nevertheless, it is interesting to surmise the outcome of such a challenge under both the rational connection and reasonable doubt standards. Under the former test, it seems likely that the instruction "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" would be upheld. In *Sandstrom*, for example, a rational connection could be found between the intent to kill and the defendant's act of stabbing the victim. But if the reasonable doubt rule were to be applied, it would be more difficult to find the necessary nexus, especially in light of the defendant's assertion that he lacked the requisite mental state.

---

42. 443 U.S. 307, *rehearing denied*, 444 U.S. 890 (1979).

43. The former standard was announced in Thompson v. Louisville, 362 U.S. 199 (1960).

44. Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original).

45. 442 U.S. 140 (1979).

46. The New York law raised a presumption that a firearm present in an automobile is possessed by all persons in the car unless (as one exception provides) the weapon is found upon the person of one of the occupants.

47. County Court v. Allen, 442 U.S. 140, 166 (1979).

48. *Id.* at 167.

A presumption in the criminal law that deals with an element of the crime must first satisfy the rational connection test previously discussed. As the following section emphasizes, the presumption must then be delivered to the jury in a constitutionally permissible manner.

B. *Delivering the Presumption to the Jury*

The *Sandstrom* Court reviewed only the second prong of the test to be met by a presumption, that is, whether the jury constitutionally used the presumption. As the Court had previously stated, the review must consider "the context of the instructions as a whole"[49] to determine if the jury gave the presumption more weight than is permissible.

At the trial level, the *Sandstrom* jury was instructed that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." On certiorari, the Supreme Court recognized that since the jury was given no further guidance on the effect of the presumption,[50] it could have been interpreted in any of four ways: as a conclusive presumption,[51] as a presumption that shifts the burden of persuasion,[52] as a permissive presumption,[53] and as a presumption that shifts the burden of production. The Court stressed that the issue "requires careful attention to the words actually spoken to the jury . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."[54]

The following sections will highlight the historical background

---

49. United States v. Gainey, 380 U.S. 63, 70 (1965).

50. "No instructions were given to the jury defining the classification, nature or effects of presumptions in criminal proceedings." Brief for Petitioner at 17, Sandstrom v. Montana, 442 U.S. 510 (1979).

51. Conclusive and mandatory presumptions may be defined as follows:

> Conclusive Presumption: a presumption in which the existence of one fact is conclusive as to the existence of another fact, and which cannot be overcome by rebutting evidence.
>
> Mandatory Presumption: a presumption in which the existence of one fact is conclusive as to the existence of another fact, but which can be overcome by rebutting evidence.

Case Note, 12 LAND AND WATER L. REV. 301, 301 n.2 (1977). *See* County Court v. Allen, 442 U.S. 140, 157 (1979)("A mandatory presumption . . . tells the trier [of fact] that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts.") (emphasis in original).

52. The *Sandstrom* court noted the two ways in which the burden of proof may be viewed. This distinction was first stated in J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 355 (1898):

> In legal discussion . . . "the burden of proof" is used in several ways. It marks, (1) The peculiar duty of him who has the risk of any given proposition on which the parties are at issue—who will lose the case if he does not make this proposition out. . . . (2) It stands for . . . the duty of going forward in argument or in producing evidence. . . . (3) There is an undiscriminated use of the phrase . . . in which it may mean either.

See also MCCORMICK, *supra* note 14, at §§ 336-47; 9 WIGMORE *supra* note 2, at §§ 2485-87.

53. The permissive inference or permissive presumption has recently been defined as "[t]he most common evidentiary device . . . which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and that places no burden of any kind on the defendant." County Court v. Allen, 442 U.S. 140, 157 (1979). A "permissive presumption" is now the equivalent of the term "inference." "The employment here of the term 'presumption' is due simply to historical usage, by which 'presumption' was originally a term equivalent, in one sense, to 'inference'." 9 WIGMORE, *supra* note 2, at § 2491.

underlying each of the ways in which the *Sandstrom* jury could have used the given presumption. Section IV will then consider *Sandstrom*'s effect on these four categories.

1. *Conclusive Presumptions*

The Court strongly noted its aversion to conclusive presumptions in *Morissette v. United States*,[55] in which the Court was faced with a federal statute that presumed intent from proof of the act. The defendant had wandered onto government property, loaded his truck with empty shell casings, and then sold the salvaged metal. Although the accused protested that he believed the casings to be abandoned, the trial court instructed the jury to presume the intent, while forbidding the defendant to rebut the presumption. Delving into the historical roots of the intent requirement, the Supreme Court concluded that:

> Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. . . . It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act.[56]

While *Morissette*'s language is compelling, the holding of the case was limited because it was based purely on the interpretation of a federal statute.[57]

The proscription against conclusive presumptions was reinforced by implication in *In re Winship*,[58] in which the Court emphasized that due process requires the prosecution to prove every element of the crime beyond a reasonable doubt. Thus, an instruction requiring the jury to presume one element from proof of another would violate this constitutional restriction.

The Court's consistent stand against the use of conclusive presumptions recently operated to strike down an instruction requiring the jury to find an intent to violate antitrust laws whenever price-fixing was the natural consequence of the defendant's acts.[59] The instruction prevented the jury from deciding an element of the crime and "ultimately, the decision on the issue of intent must be left to the trier of fact alone."[60]

The *Sandstrom* Court noted that the instruction given to the jury could have been interpreted as a conclusive presumption. "Upon finding proof of one element of the crime (causing death), and of facts insufficient to establish the second (the voluntariness and 'ordinary consequences' of

---

54. 442 U.S. 510, 514 (1979).

55. 342 U.S. 246 (1952).

56. *Id.* at 274.

57. *See* notes 79-80 and accompanying text *infra* for *Sandstrom*'s expansion of this constitutional prohibition.

58. 397 U.S. 358 (1970). *See* notes 36-39 and accompanying text *supra*.

59. United States v. United States Gypsum Co., 438 U.S. 422 (1978).

60. *Id.* at 446.

defendant's action), *Sandstrom*'s jurors could reasonably have concluded that they were directed to find against the defendant on the element of intent."[61] The general verdict gave no indication of how the jury actually perceived the instruction. This one tainted interpretation was enough to require a remand, but the Court went on to examine other approaches.

2. *Presumptions that Shift the Burden of Persuasion*

A defendant's right to due process is infringed if a presumption forces the burden of persuasion of an element of the crime onto the defendant. In *Mullaney v. Wilbur*[62] the accused was charged with murder, a crime that required proof of both intent and malice. The jury was instructed that if the requisite intent were proved, then malice would be presumed unless the defendant were able to establish that he acted in the heat of passion, a showing that would reduce the penalty imposed. The majority stated that the constitutional principle requiring the state to prove beyond a reasonable doubt every element necessary to constitute a crime is not limited to facts that, if proved, would exonerate the defendant.[63] Thus, the presumption delivered to the jury shifted the burden of persuasion to the defense, a clear *Winship* violation.

A near turnabout[64] from the *Mullaney* decision occurred in *Patterson v. New York*.[65] In that case, a statute required a defendant charged with murder to bear the burden of proof on the affirmative defense of "extreme emotional disturbance." The Court held that the allocation of the burden of persuasion on this issue did not violate due process. Unlike the statute in *Mullaney*, this mental state was not an element of the crime.[66] In short, "the reasonable doubt rule, after *Patterson*, applies only to those facts the state legislature has deemed important enough to include in the definition of the offense."[67]

In *Sandstrom*, intent was clearly an element of the crime charged so that both *Mullaney* and *Patterson* are in accord that the prosecution bore the burden of persuasion. Since the jury might have misinterpreted this

---

61. 442 U.S. 510, 523 (1979).

62. 421 U.S. 684 (1975).

63. *Id.* at 697-98.

64. *See, e.g.*, MCCORMICK, *supra* note 14, at § 341 (Supp. 1978) who found: "The constitutionality of placing the burden of persuasion on the accused with regard to an affirmative defense has been the subject of two surprising, if not contradictory, recent decisions of the Supreme Court."

65. 432 U.S. 197 (1977).

66. Thus, *Patterson* seems to have put the law back to what it was prior to *Mullaney*. "The general understanding of *Winship* after *Patterson* is just what it was before *Mullaney*: A state must prove beyond a reasonable doubt those facts that formally define the crime charged but not those facts that establish a defense or a mitigation of liability." Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1342-43 (1979).

67. Comment, *Affirmative Criminal Defenses—The Reasonable Doubt Rule in the Aftermath of* Patterson v. New York, 39 OHIO St. L.J. 393 (1978). *See* Note, *The Constitutionality of Affirmative Defenses after* Patterson v. New York, 78 COLUM. L. REV. 655 (1978).

allocation because of the faulty instruction, the defendant was denied due process.

3. *Permissive Presumptions*

A permissive presumption[68] advises the jury that they may make inferences from the circumstantial evidence presented at trial. While this is a natural function performed by a jury without direction, a presumption to this effect emphasizes to the jury that a conviction can be returned, even in the absence of direct evidence on an element of the crime.

The validity of permissive presumptions is supported by the 1979 case of *County Court of Ulster v. Allen*.[69] The Court noted that, as long as the presumption satisfies the *Leary* test[70] and the trial judge clearly indicates to the jury that it is permissive, then the presumption is valid.

The *Sandstrom* Court did not discuss the validity of a permissive presumption. Since the jury *could* have interpreted the instruction in an unconstitutional manner, a reversal was required.

4. *Presumptions that Shift the Burden of Production*

It is not clear whether a presumption that shifts only the burden of production would be deemed constitutional. Since a presumption has never been stricken for this reason, some authors have concluded that it is permissible. One writer believes that a shift in this burden has "little, if any, impact on the substantive relation between the state and the criminal accused. . . . [T]here appears to be a consensus that shifting the burden of production is a permissible housekeeping device."[71]

Strong arguments can be made, however, for reaching the opposite conclusion. The main policy behind a presumption that shifts the burden of production rests on the reasoning that since the defendant has better access to the proof of a certain element of the crime, he or she should bring forth relevant evidence. The Court has not found this policy argument to be persuasive. In *Tot v. United States*[72] the Court pointed out that defendants always have greater or equal access to the facts. "It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much."[73] The Court warned that the burden of production may not be freely shifted to the defendant. The Court has since

---

68. *See* note 53 *supra*.

69. 442 U.S. 140 (1979). *See* notes 45-48 and accompanying text *supra*.

70. *See* notes 30-31 and accompanying text *supra*.

71. Jeffries & Stephan, *Defenses, Presumptions, and Burdens of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1334 (1979).

72. 319 U.S. 463 (1943). *See* notes 25-29 and accompanying text *supra*.

73. Tot v. United States, 319 U.S. 463, 469 (1943).

interpreted *Tot* as saying that, if the rational connection test is satisfied, this burden may fall on the defendant.[74]

Two primary constitutional objections have been raised to a presumption that shifts the burden of production on an element of the offense. The first focuses on the presumption of innocence bestowed upon all defendants in criminal trials. If the defendant produced no evidence on the element, the prosecution would be entitled to an unconstitutional directed verdict. "A true shifting of the burden of producing evidence to the defendant in a criminal case would mean that the court would be compelled to direct the jury to find against him with regard to the presumed fact if he fails to introduce sufficient proof on the issue."[75]

A second constitutional argument notes that if a defendant is forced to come forward with evidence on an element of the crime, it might force the defendant to take the witness stand. One Supreme Court Justice warned that this would be a "clear violation of the accused's Fifth Amendment privilege against self-incrimination."[76]

The Supreme Court of Montana found that the *Sandstrom* instruction was innocuous since it shifted only the burden of production to the defendant. The court noted that there was no proscription against allocating "*some* burden of proof to a defendant under certain circumstances. . . . Defendant's sole burden . . . was to produce some evidence that he did not intend the ordinary consequences of his voluntary acts."[77] However, the United States Supreme Court observed that even Montana's Rules of Evidence would have led to an unconstitutional interpretation of the presumption.[78] Thus, *Sandstrom* did not reach the question of to what extent the burden of production can be levied on the criminal defendant.

IV. RAMIFICATIONS OF *Sandstrom*

The Court in *Sandstrom* focused on the manner in which the presumption was delivered to the jury and concluded that it could have been interpreted in any of four ways. The following sections discuss the light shed by *Sandstrom* on the constitutionality of each of these four possible interpretations, as well as the questions *Sandstrom* left unanswered.

---

74. Barnes v. United States, 412 U.S. 837, 846 n.11 (1973).

75. MCCORMICK, *supra* note 14, at § 342.

76. Turner v. United States, 396 U.S. 398, 432 (1970) (Black, J., dissenting).

77. State v. Sandstrom, 580 P.2d 106, 109 (Mont. 1978), *rev'd*, 442 U.S. 510 (1979) (emphasis in original).

78. MONT. R. EVID. 301 (b) (2) requires a preponderance of the evidence to overcome this presumption. The Supreme Court concluded that "[s]uch a requirement shifts not only the burden of production, but also the ultimate burden of persuasion on the issue of intent." Sandstrom v. Montana, 442 U.S. 510, 518 (1979).

A. *Conclusive Presumptions*

The *Sandstrom* decision raised the proscription against conclusive presumptions to a constitutional level. Although *Morissette*[79] struck down such a presumption, the case was limited to federal law and did not discuss the constitutional implications. Furthermore, *Morissette* was decided long before the presumption of innocence or proof beyond a reasonable doubt were expressly cited as constitutional principles. Citing cases such as *Morissette*, the Court in *Sandstrom* stated:

> [A] conclusive presumption in this case would "conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime," and would "invade [the] fact-finding function" which in a criminal case the law assigns solely to the jury.[80]

Any presumption requiring the jury to find the existence of one element of a crime from proof of another thus will be viewed as a constitutional violation. While this is not at all an unexpected conclusion since *Winship* requires proof beyond a reasonable doubt on every element of the crime, it is significant that *Sandstrom* has so clearly resolved the issue.

B. *Shifting the Burden of Persuasion*

Sandstrom confirmed the holdings of prior cases cautioning that a presumption that shifts the burden of persuasion on an element of the crime to the defendant violates due process. Since intent was an element of the crime charged, the *Sandstrom* instruction may have been used by the jury in this unconstitutional manner.

The *Sandstrom* Court was unequivocal on this issue, but it failed to resolve a related problem that has long plagued the criminal law: when intent is an element of the crime, can the defendant be made to bear the burden of persuasion on the issue of insanity?

An old English decision, *M'Naghten's case*,[81] established the principle that every person is presumed sane and the burden of persuasion on the issue of insanity rests on the accused, a principle subsequently adopted by many American jurisdictions.[82] In the federal courts the prosecution must prove sanity beyond a reasonable doubt,[83] although the states are not constitutionally required to follow this rule.

The Court confronted this issue in *Leland v. Oregon*,[84] a 1952 case in which that state's law required a defendant in a murder trial to prove

---

79. *See* notes 55-57 and accompanying text *supra*.
80. 442 U.S. 510, 523 (1979).
81. 8 Eng. Rep. 718, 10 Cl. & Fin. 200 (H.L., 1843).
82. 9 WIGMORE, *supra* note 2, at § 2501.
83. Davis v. United States, 160 U.S. 469 (1895).
84. 343 U.S. 790 (1952).

insanity beyond a reasonable doubt. Over a strong dissent,[85] the Court found no due process violation since sanity was "an issue set apart from the crime charged."[86] Despite this assertion, it is not clear whether questions of sanity and intent are so distinct[87] that the defendant can be made to bear the burden of proof on the former while the prosecution must prove the latter. *Winship*[88] requires the prosecution to prove every element of the crime beyond a reasonable doubt. Thus, if the issue of insanity and intent do in fact overlap, the burden imposed on the defendant would be violative of the *Winship* rule. Notions of due process have evolved since the *Leland* pronouncement, causing some commentators to believe that a similar statute today would no longer meet constitutional tests.[89]

The Court, however, has given no indication that it plans to overturn *Leland*. The dissent in *Mullaney*[90] reaffirmed the idea that insanity and mens rea are separate issues and can impose different burdens of proof on the parties. In 1976, a case specifically questioning the continuing validity of *Leland* was dismissed by the Court because it did not raise a substantial federal question.[91] Finally, in *Patterson v. New York*,[92] the Court stated "[w]e are unwilling to reconsider *Leland* and *Rivera*."[93] *Sandstrom* offered no further guidance on this conceptual perplexity.

C. *Permissive Presumptions*

Sandstrom does not dwell on the constitutional validity of a permissive presumption since the jury may have viewed the instruction as mandatory. "They were not told that they had a choice, or that they might infer that conclusion; they were told only that the law presumed it."[94] The constitutionality of a permissive presumption is, however, clear. The jury will ordinarily draw inferences on their own, and a permissive presumption (assuming that it meets the rational connection test) merely assists this process.

D. *Shifting the Burden of Production*

The constitutionality of requiring the defendant to bear the burden of

85. Justices Frankfurter and Black argued that although a state generally has much flexibility in determining how the issue of insanity is to be handled, the Oregon statute imposed a burden beyond the restrictions of the fourteenth amendment. *Id.* at 802-07. (Black and Frankfurter, JJ., dissenting).

86. *Id.* at 795-96.

87. *See* Comment, *Mens Rea and Insanity*, 28 MAINE L. REV. 500 (1976) for a discussion of the problem and how mens rea and insanity can sometimes coexist.

88. 397 U.S. 358 (1970). *See* notes 36-39 and accompanying text *supra.*

89. *See, e.g.*, Monaghan, *The Supreme Court, 1974 Term*, 89 HARV. L. REV., 49, 51-53 (1975) (suggests that the combination of *Winship* and *Mullaney* "calls into question the continued validity of state rules requiring defendants to prove insanity as a defense to a criminal charge").

90. Mullaney v. Wilbur, 421 U.S. 684, 705 (1975). *See* notes 62-63 and accompanying text *supra.*

91. Rivera v. Delaware, 429 U.S. 877 (1976).

92. 432 U.S. 197 (1977).

93. *Id.* at 207.

94. 442 U.S. 510, 515 (1979).

production on an element of the crime has long been an unsolved mystery.[95] *Sandstrom* made no effort to end the debate. The only reference to this issue is a footnote explaining how the burden differs when it rests on the prosecutor or the defendant.[96] A prosecutor's failure to meet this burden leads to an acquittal. A defendant's failure to meet the burden of production cannot, however, result in a directed verdict. Perhaps the Court is implying that on certain issues a defendant normally must present some evidence or the circumstantial evidence will overwhelm the presumption of innocence. For example, in *Holland v. United States*,[97] a sizeable, unexplained increase in defendant's net worth resulted in a conviction for tax fraud. The Court affirmed the conviction, finding no constitutional problem in the fact that the circumstantial evidence imposed a burden on the defendant to explain his finances. In contrast, a true shifting of the burden of production (that is, one that would result in a directed verdict if no evidence were produced) would be impermissible. *Sandstrom* leaves the resolution of this issue to future decisions, and its fleeting reference to the problem is unclear.

V. Attending to the Restrictions on Presumptions

State legislatures, faced with the limitations on presumptions of intent and the apparent confusion regarding the insanity defense may concoct some novel methods of avoiding the entire problem. One such method is to redefine or eliminate an element of the crime so that a presumption that normally aids in the proof of an elusive element will no longer be needed. An example of such a redefinition is Ohio's receipt of stolen property statute.[98] Although *actual* knowledge was formerly a part of the crime, the present statute states that "knowing or having *reasonable cause* to believe" that the property is stolen will satisfy a conviction.[99] Thus, the legislature has redefined an element of the crime, and has changed actual knowledge to knowledge that a reasonable person would have had. This newer element is much less difficult to prove, and no presumption of any kind is necessary.

While it is questionable whether such drafting can avoid the

---

95. *See* notes 71-76 and accompanying text *supra*.

96. 442 U.S. 510, 516 n.5 (1979).

97. 348 U.S. 121 (1954).

98. Ohio Rev. Code Ann. § 2913.51 (Page 1975).

99. *Id.* (emphasis added). The statute states: "(A) No person shall receive, retain or dispose of property of another, knowing or having reasonable cause to believe it has been obtained through commission of a theft offense." The Committee Comment states: "This section differs from the former offense of receiving stolen property. . . . Under the former statute an offender actually had to know that the property received was stolen property, whereas under this section it is sufficient if the offender had reasonable cause to believe that the property is 'hot'." Committee Comment, Ohio Rev. Code Ann. § 2913.51 (Page 1975). This statute was held valid despite a due process challenge. State v. Arthur, 42 Ohio St. 2d 67, 325 N.E.2d 888 (1975). The court held that possession of stolen goods can create an inference of guilty knowledge which resulted in a conviction.

restrictions outlined in *Sandstrom*, the constitutional validity of *omitting* elements of a crime would be even more suspect. This scheme is an inviting one since cases such as *Morissette* and *Patterson* confine their restrictions (regarding presumptions that are conclusive or that shift the burden of persuasion) to elements that are included in the definition of the crime. Nevertheless, the special status of intent in the criminal law unavoidably suggests that its elimination would be viewed as a deprivation of due process. Jerome Hall, a chief proponent of the necessity of the intent element, writes that the principles of criminal law can be stated in a single generalization: "The harm forbidden in a penal law must be imputed to any normal adult who voluntarily commits it with criminal intent, and such a person must be subjected to the legally prescribed punishment."[100] Likewise, case law has recognized the salience of the intent element. *Morissette* noted:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.[101]

The Court continued:

> The purpose and obvious effect of doing away with the requirement of a guilty intent is to ease the prosecution's path to conviction, to strip the defendant of such benefit as he derived at common law from innocence of evil purpose, and to circumscribe the freedom heretofore allowed juries.[102]

The Model Penal Code also reflects the importance of the element of intent.[103]

An examination of strict liability statutory offenses provides an interesting sidelight to this issue. These statutes require no mental element and are justified with policy arguments focusing on the benefit to enforcement and efficiency.[104] Typically, strict liability has been confined to areas such as public welfare offenses[105] and public nuisances.[106] The Model Penal Code permits strict liability only for minor offenses carrying minimal penalties and stigma.[107] Nevertheless, liability without guilty intent has been imposed on defendants in more serious crimes. The most notable is *United States v. Balint*,[108] in which the defendant was convicted of selling opium illegally, although he argued that he believed it to be

100. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 18 (2d ed. 1947) (emphasis deleted).

101. Morissette v. United States, 342 U.S. 246, 250 (1952).

102. *Id.* at 263.

103. *See, e.g.*, MODEL PENAL CODE § 210.1 Criminal Homicide; § 210.2 Murder (P.O.D. 1962).

104. *See* Mueller, *Mens Rea and the Law Without It*, 58 W. VA. L. REV. 34, 38 (1955).

105. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).

106. R. PERKINS, CRIMINAL LAW ch. 7, § 5 (2d ed. 1969).

107. MODEL PENAL CODE § 2.05 & Comments (P.O.D. 1962).

108. 258 U.S. 250 (1922).

sugar. While it has been suggested that the strict liability approach may be an effective one,[109] most commentators remain critical, and courts often imply the mental element into the statute.[110] A classic test to decide whether a mental element should be implied in a federal law was enunciated in *Holdridge v. United States*:[111]

> From these cases emerges the proposition that where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Thus, strict liability has been confined to minor offenses, illustrating a recognition that intent is a necessary element of more severe crimes carrying more severe penalties.

Recent cases such as *Sandstrom* shed no light on the issue whether *any* elements of a crime could be eliminated in an attempt to avoid the inherent restrictions on the use of presumptions. Professor McCormick suggests that a state may reallocate the burden of persuasion at will by simply electing to define their statutes in the appropriate manner.[112] The case law, however, hints otherwise. In *Mullaney*,[113] the prosecution argued that the *Winship* test should not extend to elements of the crime bearing only on punishment, as opposed to guilt. The Court responded:

> [I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment.[114]

---

109. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

110. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 31 at 218 (1972).

111. 282 F.2d 302, 310 (8th Cir. 1960).

112. MCCORMICK, *supra* note 14, at § 341 (Supp. 1978):
Although the Court in *Patterson* did not intend to overrule *Mullaney*, the remaining vitality of the latter is doubtful. Limiting *Mullaney* to instances in which the very gravamen of the affirmative defense is included in the definition of the crime itself severely restricts the effectiveness of the case as precedent. States electing to place the burden of persuasion with regard to an affirmative defense on the accused must be careful to word or to reword their statutes so as to eliminate from the definition of the offense the converse of the element which the defendant must prove. If so worded, the allocation of the burden to the accused will probably survive an attack based upon *Winship*, *Mullaney*, and the due process clause. Broad limitations on the power are suggested in *Patterson*, but it now may be that if the state has the constitutional power to make acts criminal, it may provide for conviction based upon these acts alone and relegate all mitigating factors to the status of affirmative defenses to be established by the defendant by a preponderance of the evidence.

113. Mullaney v. Wilbur, 421 U.S. 684 (1975). *See* notes 62-63 and accompanying text *supra*.

114. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).

Mullaney is still good law although *Patterson*[115] drained much of its force. Nevertheless, even the latter case addresses this issue:

> This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crime now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard.[116]

The dissent was not reassured:

> The test the Court today established allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the nonexistence of that factor in statutory language that defines the crime.[117]

While the constitutional limitations are by no means clear (if, indeed, they exist), at least such statements by the Court manifest a recognition of the problem and the Court's watchful eye in this area.

Setting constitutional limitations on the type of elements that can be omitted from a crime necessarily entails a determination of what elements are essential components of the crime. Although a formidable task, at least one commentary makes impressive headway in articulating such essentials.[118] Until the Court formulates firm rules, however, the Montana legislature could feasibly eliminate the intent element from the crime of murder and thereby evade the *Sandstrom* problem in the future.

It has also been suggested[119] that a sure way to conform to the restrictions on presumptions is to avoid use of the word "presume." Instructing the jury simply that they may "infer" intent from the act would probably avoid the *Sandstrom* dilemma. The jurors would be more likely to perceive the presumption as a mere permissive inference. This may not always be the ultimate solution, however. For example, in a recent Ohio case, *State v. Price*,[120] the jury received the instruction " '[a] person acts purposely when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby.' "[121] The Ohio Supreme Court found no constitutional violation since the instruction, when viewed as a whole, did not relieve the state of its burden of proof.[122] But it seems unclear whether a reasonable juror could have interpreted the instruction as presuming intent from the act.

A final method to abide by the constitutional boundaries of

---

115. Patterson v. New York, 432 U.S. 197 (1977). *See* notes 64-67 and accompanying text *supra*.

116. Patterson v. New York, 432 U.S. 197, 210 (1977).

117. *Id.* at 223 (Powell, J., dissenting). Justice Powell had written the majority opinion in *Mullaney*.

118. Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

119. Case Note, 12 LAND AND WATER L. REV. 301 (1977).

120. 60 Ohio St. 2d 136, 398 N.E.2d 772 (1979).

121. *Id.* at 140, 398 N.E.2d at 774-75.

122. The case will be appealed to the United States Supreme Court. Interview with Prof. Charles Thompson, Ohio State University, Columbus, Ohio (December 1979).

presumptions (and the safest alternative) is to eliminate the presumption altogether. Ohio's Jury Instructions reflect this approach, recommending that no charge be given to presume or infer intent from the act.[123] As case law dictates, intent would then be established by circumstantial evidence and inferences that the jury will naturally draw.[124]

VI. CONCLUSION

In many ways, presumptions still involve "subtle conceptions to which not even judges always bring clear understanding."[125] The *Sandstrom* Court, however, took a step forward in deciphering the problems attending use of presumptions. *Sandstrom* raised the prohibition against the use of conclusive presumptions to a constitutional level, and it reaffirmed the proscription against shifting the burden of persuasion on an element of the crime to the defendant. The Court also impliedly noted the continued validity of permissive presumptions.

Sandstrom left two issues unresolved. The first is to what extent a criminal defendant can be made to bear the burden of proof on the defense of insanity when intent is an element of the crime. The second unanswered question is whether a defendant can be made to bear a burden of production on an element of the crime. Future cases must confront these salient issues, but *Sandstrom* made impressive headway in delimiting the constitutional restrictions that will be imposed on presumptions in the criminal law.

Diane Marshall Ennist

---

123. 4 OHIO JURY INSTRUCTIONS § 409.01 "Intent, Motive . . . (d) Presumption. Comment. The Committee recommends that no instruction be given on the presumption or inference that a person intends the natural consequences of his acts."

124. United States v. United States Gypsum Co., 438 U.S. 422, 435 (1978).

125. Bollenbach v. United States, 326 U.S. 607, 614 (1946).